IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Murder Reference No. 1 of 2006

Date of Decision: - September 20, 2006

State of Haryana ....APPELLANT

VERSUS

Surender @ Mithan ....RESPONDENT

Criminal Appeal No. 186-DB of 2006

Surender @ Mithan ....APPELLANT

VERSUS

State of Haryana ....RESPONDENT

CORAM: HON'BLE MR. JUSTICE MEHTAB S.GILL
HON'BLE MR. JUSTICE BALDEV SINGH

Present::- Mr. Kulvir Narwal, Additional Advocate General, Haryana

Ms. Jyoti Chaudhry, Advocate for the convict/appellant.

Murder Reference No. 1 of 2006 and
Criminal Appeal No. 186-DB of 2006

MEHTAB S.GILL, J.

This is a Murder Reference sent by the Additional Sessions Judge, Sonepat under Sections 366/368 of the Cr.P.C. The learned Additional Sessions Judge, Sonepat vide its judgment/order dated 14.2.2006/15.2.2006 convicted appellant Surender @ Mithan son of Om Parkash under Sections 302/364A/201 IPC and sentenced him to the penalty of death under Section 364A IPC and under Section 302 IPC. Further he convicted the appellant under Section 201 IPC and sentenced him to undergo RI for seven years.

We will be taking up Murder Reference No. 1 of 2006 and the appeal preferred by appellant Surender @ Mithan, i.e. Criminal Appeal No. 186-DB of 2006 together and will be passing a common judgment, as both arise out of the same judgment/order.

The case of the prosecution is unfolded by the statement Ex.PO, of Dr. Dharmender Sharma, given to SI Yad Ram, SHO, Police Station Kharkhoda on 15.3.2004 at 3.00 A.M. at Sharma Nursing Home, Farmana. Dr. Dharmender Sharma stated that he is running a clinic under the name and style of Sharma Hospital near the bus stand. He has two children, elder is Dharuv aged 9 years and younger is Oju aged 3 years. On 14.3.2004 at about 8.00 P.M. he was sitting inside his hospital and his younger son was playing near the gate of the hospital. After some time, he found that his son Oju was missing. He searched for him, but could not find him. He suspected that Naresh son of Mohinder Singh, Jat, resident of Farmana and his accomplice Sunil son of Simmal, resident of Farmana have kidnapped his son Oju in order to get ransom and

with intent to kill him. There is apprehension that some other person may also be involved with them. On the basis of this statement, FIR Ex.PG was recorded.

The prosecution to prove its case, brought into the witness box Dr. Anju Sharma as PW1, Mukesh Pruthi as PW2, Inder Pal Draftsman as PW3, Anil Kumar Srivastva as PW4, ASI Ram Kumar as PW5, HC Ram Prem as PW6, Dr. S.K.Dhattarwal as PW7, Shiv Kumar as PW8, Madan Lal Malik as PW9, Ruder Dutt as PW10, Dr. Dharmender Sharma as PW11, SI Yad Ram as PW12, Inspector Ram Dutt as PW13, HC Raj Pal as PW14, Constable Naresh Kumar as PW15.

Learned counsel for the appellant has argued that the circumstances relied upon by the learned trial Court are not cogent and convincing. The story of the deceased being seen with the appellant, mobile telephone calls given by the appellant on the cell phone of the father of the deceased, demand of Rs.7 lacs as ransom money, the dead body being recovered at the instance of the appellant and the extra judicial confession allegedly made by the appellant, do not complete the chain of circumstances. Appellant cannot be convicted on the basis of the evidence produced before the Court. Dr. Anju Sharma PW1 the mother, Madan Lal Malik PW9 the maternal grand father of the deceased and Dr. Dharmender Sharma father of the deceased are all interested witnesses.

Mukesh Pruthi PW2, has stated in his testimony that on 14.3.2004 at about 6.00 p.m., he had come to Sharma Hospital to collect the payment of medicines from Dr. Dharmender Sharma PW11. FIR

Ex.PG was recorded on 15.3.2004 at 4.15 A.M. Mukesh Pruthi PW2 could have come to know from a newspaper on the next day i.e. on 15.3.2004 about the occurrence. He has stated that he knew both appellant and the deceased child Oju. It is strange that at the bus stand he recognized the appellant, but he did not recognize Oju, who was being carried allegedly by the appellant. He did not try to stop the appellant from taking away the child.

The extra judicial confession made to Madan Lal Malik PW9, the maternal grand father of the deceased, is not reliable. It is after about one month as stated by Madan Lal Malik PW9, that appellant came to him on 7.4.2004 and made a confession before him that he had kidnapped Oju and confessed of his crime. Similarly, the statement of Dr. Dharmender Sharma PW11, is also not convincing and trustworthy, as he has stated that appellant was known to him and used to come to his house often. In fact, so close was the relationship of the appellant and Dr. Dharmender Sharma PW11, that treatment of the mother of the appellant was done by Dr. Dharmender Sharma PW11, father of the deceased. Appellant had also helped Dr. Dharmender Sharma PW11, in the construction of his house. The mobile phone used, was not in the name of the appellant, but in the name of one Sudhir as stated by Mr. Anil Srivastava PW4 of the Escotel Mobile Company. Learned counsel for the appellant has further argued that the circumstances as given by the prosecution do not form a chain and the appellant deserved to be acquitted by giving him the benefit of doubt.

Appellant should be awarded the sentence of death as all that can be presumed from the evidence of the prosecution if found truthful is that the appellant did not want to kill the child but at the most, wanted ransom money for his sole venture. Unfortunately, the child was put in the gas outlet of the chimney of a brick kiln. Brick kiln at that time was not working. If it had been so, the body would have got burnt.

Learned counsel for the State has argued that the appellant was known to Dr. Dharmender Sharma PW11, as he had done earth filling work for him. No suggestion has been put by the defence to the contrary that appellant was not known to the father of the deceased. It is on the basis of the disclosure statement Ex.PM, made by the appellant that mobile phone No. 9812064388 was recovered from under Turi, vide recovery memo Ex.PN. The extra judicial confession made to Madan Lal Malik PW9, is trustworthy, as he was feeling guilty conscious, the appellant confessed his guilt to Madan Lal Malik PW9 the father-in-law of Dr. Dharmender Sharma PW11. The police did not come into action from 15.3.2004 to 26.3.2004, as it did not want the child to be harmed by the appellant. Inspector Ram Dutt PW13 took over the investigation of the case on 26.3.2004 after the case was handed over to him. The dead body of Oju was recovered from the gas outlet of a brick kiln, on the disclosure statement made by the appellant. Delay, if any, in lodging the FIR has been adequately explained, as the parents of the deceased kept quiet, so that no harm would come to him and also to bargain with the appellant for the release of the child.

Learned Counsel has further argued that the Murder reference be accepted, as killing of a small child of 3-½ old years is a crime against society. The little child had all of his life before him, which was extinguished by the appellant, for lust of money. Appellant did not stop demanding the ransom money even after the child had died.

We have heard the learned counsel for the parties and perused the record with their assistance.

Mukesh Pruthi PW2 is an independent witness. He has stated in his testimony before the Court, that he used to come to Sharma Hospital for supply of medicines, which was owned by Dr. Dharmender Sharma PW11. On 14.3.2004 at about 6.00 P.M., he reached Village Farmana to collect some payment from Dr. Dharmender Sharma PW11. After taking his payment at about 7.45 P.M. on the same day, he went to bus stand Farmana. He was waiting for a jeep to go to Rohtak and in the light of the liquor vend, he saw appellant come running from the side of Sharma Hospital carrying a child. He asked the appellant as to where from he was coming. He told him that he was coming from Dr. Dharmender Sharma's hospital after showing the child, as the child was not feeling well. Mukesh Pruthi PW2 did not see the face of the child and presumed that the child carried by the appellant was his own. He has further stated, that appellant was well known to Dr. Dharmender Sharma PW11 and he often found him sitting in the hospital. On the next day i.e. on 15.3.2004, he came to know about the occurrence that Oju son of Dr. Dharmender Sharma PW11 had been kidnapped. He came to Farmana and on 15.3.2004, his statement was

recorded at 12.30 P.M. by the police. Dr. Anju Sharma PW1 and Dr. Dharmender Sharma PW11 have corroborated the version as stated by Mukesh Pruthi PW2. Dr. Anju Sharma PW1 has stated that it is correct that at the first instance, her husband (PW11) complained about Naresh and Sunil as these two persons were criminal minded, but later on they came to know that it was not Naresh or Sunil who committed the offence, but appellant Surender @ Mithan. Similarly, Dr. Dhamender Sharma PW11, has stated that on 26.3.2004 at about 2.15 P.M., he received a telephonic call from mobile No.9812064388, which was received on his mobile No. 9812008042. The person who telephoned him stated that his son was with him and he would return his son Oju if he was given a ransom of Rs. 7 lacs. As he knew the appellant personally, he recognized the voice of the caller that being Surender @ Mithan son of Om Parkash @ Ajit Singh, resident of Village Farmana. Thereafter the appellant rang him 8-10 times between 2.15 P.M. to 4.00 P.M. Appellant had been coming to his hospital for the last 4-5 years. In February 2004, he treated his mother. She remained admitted in the hospital from 16.2.2004 to 23.2.2004. Hospital Register Ex.PZ shows that Phoolpati w/o Ajit Singh remained admitted in the hospital during this period. Deceased Oju often played with the appellant during this period, when the appellant's mother was admitted in the hospital. Appellant's mother remained admitted in the hospital till 23.2.2004 as per page Nos. 88 and 96 of the register Ex.PZ. Dr. Dharmender Sharma has further stated that on the same day i.e. on 7.4.2004 at 6.30 P.M., the police party came along with the appellant.

Appellant identified the spot where deceased Oju was taken, which was the gas outlet of the chimney of a brick kiln. The dead body of the child was taken out. It was identified by Dr. Dharmender Sharma PW11. The deceased was wearing the same clothes, which he was wearing, when he was kidnapped. He has further stated that appellant was well known to all his family members for the last 4-5 years. He also knew Madan Lal Malik PW9. Appellant came to know Dr. Dharmender Sharma PW11 and his family members when Dr. Dharmender Sharma PW11 was constructing his hospital, as appellant had done the earth filling work. The construction of the hospital was being supervised by Madan Lal Malik PW9 as he was an engineer. It was after Mukesh Pruthi PW2 told about the suspicious way the appellant behaved with him and also after the telephone calls received on the mobile phone of his (PW11) that he immediately informed the police that appellant is the one who had kidnapped his child.

The Investigating Officer SI Yad Ram PW12 has stated, that during interrogation of the appellant, he suffered a disclosure statement Ex. PAD that he had concealed the dead body of Oju in a gas outlet of a brick kiln. The disclosure statement Ex.PAD was signed by the witnesses. After reaching the spot, the appellant got recovered the dead body of the child after entering into the gas outlet of the chimney of the brick kiln. The body was identified by Dr. Dharmender Sharma PW11. It was taken into possession vide recovery memo Ex.PAA. Similarly, Inspector Ram Dutt PW13 has stated, that on 26.3.2004 he was posted as Inspector CIA Staff Sonepat. Dr. Dharmender Sharma told him that appellant was

demanding Rs. 7 lacs as ransom to return his child. On 27.3.2004 mobile No.9812064388 from which calls were made to Dr. Dharmender Sharma. The details of the calls were taken into possession from Escotel Company. Copy of the details is Ex.PD, which were taken into possession vide memo Ex.PC. Statement of Anil Srivastava PW4, Chief Manager of Escotel Sonepat, was recorded. Details of calls of Mobile Phone No.9812008042 Ex.PF were taken on 30.3.2004 and ownership proof of Mobile No.98120-64388. Ex.PF/2 was also taken into possession. This was the mobile, which was owned by the appellant. On 9.4.2004 the appellant suffered a disclosure statement Ex.PM and in pursuance of the disclosure statement, his mobile phone make Motorola, was recovered from his residence and taken into possession vide recovery memo Ex.PN. This mobile phone had IMEI No.449269-18-104514-7. This IMEI No. was compared with the details which were received from Escotel of mobile No. 9812064388 and was found to be the same. The details of the mobile phone calls were taken from Escotel vide applications Ex.PAG, Ex.PAG/1 and Ex.PAG/2.

Sh. Anil Srivastava PW4 has stated that on 29.3.2004 the police received computerized statements of calls made from mobile No. 9812064388 and also the IMEI details, the ownership document Ex.PD. These calls were made from mobile No. 9812064388 during the period of 18.3.2004 to 29.3.2004. Statements of calls being Ex.PD, Ex.PD/1 to Ex.PD/3. The IMEI No. of mobile phone No. 9812064388 (appellant's) is 44926918104514 and IMEI No. of mobile phone No. 9812008042 (Dr. Dharmender Sharma PW11) being 44931787332583. He has further stated

that IMEI No. is a code number of the hand set and this number is an exclusive number of the mobile hand set. When a mobile sim card is used in any hand set and a call is made from that phone to any other phone, the IMEI number of the calling mobile hand set as well as the IMEI number of the hand set on which the call has been received, they both are recorded in their exchange. It is clear from the statement of Sh. Anil Srivastava PW4 that from the period 18.3.2004 to 29.3.2004, appellant was making calls to Dr. Dharmender Sharma PW11 and demanding a ransom of Rs. 7 lacs.

The recovery of the dead body was on the instance of the appellant. Appellant put the child into the gas chamber of the chimney of the brick kiln to hide him, least realizing that he would die. The mobile phone numbers of the appellant and Dr. Dharmender Sharma PW11 when compared with the IMEI Nos., it came out that appellant was making phone calls to Dr. Dharmender Sharma PW11. Appellant had falsely taken the sim card number in the name of one Sudhir.

Taking the mitigating and aggravating circumstances into consideration, we are of the considered opinion that the case of the appellant does not fall within the category of rarest of rare cases. It has come in evidence that the appellant put the child in the gas outlet of the chimney least realizing that he would die. The intention of the appellant was to extract ransom money and not to kill the child. If he had wanted to murder Oju, he could have done so on the same day when the child was kidnapped in the night. No injury mark has been detected by Dr. S.K.Dhattarwal PW7. In Criminal Appeal No. 186-DB of 2006, we do not

find any infirmity in the judgment of the trial Court qua the conviction of the appellant under Section 302 IPC. Sentence of the appellant is on the harsher side. The mitigating circumstances going in favour of the appellant for not awarding him the death penalty is that firstly, it is a case of circumstantial evidence though the chain of events is complete. The child was not killed by the appellant, but in his eagerness to conceal the child, he put him in the gas outlet of the brick kiln. He did not realize that the child was too small to survive in a place, which was not properly ventilated.

Sentence of appellant is modified from death penalty to that of life imprisonment. Appellant shall pay a fine of Rs. 2,50,000/-, in default to further undergo two years rigorous imprisonment. Out of this amount of Rs. 2,50,000/-, Rs. 2,00,000/- shall be paid to Dr. Dharmender Sharma PW11, the father of the deceased as compensation.

With the above modification of sentence and fine, appeal of the appellant is dismissed.

Murder Reference is declined.

(MEHTAB S.GILL)
JUDGE

(BALDEV SINGH)
JUDGE

September 20, 2006
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WHETHER TO BE REFERRED TO REPORTER? YES/NO